In the High Court of Punjab and Haryana, Chandigarh.

Crl. Appeal No.419-DB of 1998

Date of Decision: 30.05.2008

Sunil Kumar @ Kala.

....Appellant.

Versus

State of Haryana.

....Respondent

Coram:- Hon'ble Mr.Justice J.S. Khehar.
Hon'ble Mr. Justice Jora Singh.

Present: Mr. B.R. Vohra, Advocate
for the appellant.

Mr. Ravi Dutt Sharma, D.A.G., Haryana
for the respondent.

...

J.S. Khehar, J.

Through the instant appeal the accused/appellant Sunil Kumar @ Kala has impugned the judgement rendered by the Additional Sessions Judge, Ambala, in Sessions Case No.15 of 1997, on 22.8.1998, by which the accused/appellant Sunil Kumar @ Kala has been convicted for the offence, under Section 302 of the Indian Penal Code for having intentionally committed the murder of Parmil Kumar. Additionally, the accused/appellant Sunil Kumar @ Kala has been convicted under Sections 323 read with Section 34 of the Indian Penal Code, as well as, 506(1) read with Section 34 of the Indian Penal Code. The accused/appellant Sunil Kumar @ Kala has also impugned the order passed by the Additional Sessions Judge,

Ambala, on 25.8.1998 whereby, the accused/appellant Sunil Kumar @ Kala has been sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/-, under Section 302 of the Indian Penal Code. In case of default in payment of fine, he has been ordered to undergo further rigorous imprisonment for one year. Additionally, he has been been sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.500/-, for the offence under Section 323 read with Section 34 of the Indian Penal Code. In case of default in payment of fine, he has been sentenced to undergo further rigorous imprisonment for two months. For the offence under Section 506(1) read with Section 34 of the Indian Penal Code, the accused/appellant Sunil Kumar @ Kala has been sentenced to undergo imprisonment for six months and to pay a fine of Rs.500/-, under Section 302 of the Indian Penal Code. In case of default in payment of fine, he has been ordered to undergo further rigorous imprisonment for two months.

The prosecution version of the incident emerges from the complaint made by the complainant Mohan Lal PW5 to ASI Puran Chand PW7, on 8.9.1995. In his complaint, Mohan Lal PW5 stated that he was a resident of village Shahazadpur under Police Station, Naraingarh, and was engaged in agriculture. He stated that on the evening of 8.9.1995, he had gone to a “mela” of the “basera at Guga Mari” at Shahazadpur, and after paying obeisance at the “Guga Mari”, he had returned to his residence alongwith his children, and had gone to sleep at about 8/9 PM. His nephew i.e. the deceased Parmil Kumar came to his residence at about 1.00 AM on the night intervening 8/9.9.1995, and after waking him, told him, that the accused Pawan Kumar, Parmod Kumar @ Tori, Vinod Kumar @ Pinki and

two other persons, namely, Sham Singh and Sonu, all residents of Shahazadpur, had given him a beating at the "basera at Guga Mari". The complainant Mohan Lal PW5 got up so as to get his nephew i.e. the deceased Parmil Kumar treated from a doctor. While he was on his way to the doctor, Pawan Kumar, Parmod Kumar @ Tori, Vinod Kumar @ Pinki, Sham Singh, Sunil Kumar @ Kala and Sonu, armed with "lathis" and hockey sticks, confronted them on the road in front of the flour mill of Gian Chand, blacksmith. Ram Kumar raised a "lalkara" that Parmil Kumar had escaped previously after picking a quarrel with them, now he should be taught a lesson. On hearing the "lalkara" of Ram Kumar, the complainant Mohan Lal PW5 requested all the accused that they had already injured Parmil Kumar, and that, he was taking him to a doctor for treatment, and further that, it was not good for them to quarrel. On hearing the complainant Mohan Lal PW5. Pawan Kumar told his companions, that the complainant Mohan Lal PW5 should be taught a lesson first. Thereafter, Pawan Kumar gave a "lathi" blow on the head of the complainant Mohan Lal PW5, and Parmod Kumar @ Tori gave a "lathi" blow on the right shoulder of the complainant Mohan Lal PW5. Whereas, the accused/appellant Sunil Kumar @ Kala gave a "lathi" blow on the head of Parmil Kumar. On being assaulted, the complainant Mohan Lal PW5, as well as, Parmil Kumar raised an alarm "bachao-bachao" (help-help). At that stage, Dharam Pal, Satish, Raju and Shiv, who were following them, reached the place of occurrence. Despite the arrival of the aforesaid persons, Vinod Kumar gave a "lathi" blow on the head of the complainant Mohan Lal PW5, which he tried to evade of by raising his hand, and as such, the "lathi" blow hit the complainant Mohan Lal PW5 on the thumb of

his right hand. Even at that juncture, Sham Singh and Sonu continued to give fist blows to the complainant Mohan Lal PW5, as also, to Parmil Kumar. While both, the complainant Mohan Lal PW5, as well as, Parmil Kumar were lying on the ground, persons who had arrived at the place of occurrence, namely, Dharam Pal, Satish, Raju and Shiv, according to the complainant Mohan Lal PW5, saved them. All the aforesaid six persons involved in the assault, left the place of occurrence alongwith their "lathis" and hockey sticks. Thereafter, the complainant's father and other persons, who had gathered at the place of occurrence, took the complainant Mohan Lal PW5 and the deceased Parmil Kumar to the Civil Hospital, Shahazadpur, for treatment. Parmil Kumar, according to the complainant Mohan Lal PW5, had become unconscious when they had reached the Primary Health Centre, Shahazadpur. He was, accordingly, referred to the General Hospital by the attending doctor. In his complaint, the complainant Mohan Lal PW5 asserted that legal action be taken against Pawan Kumar, Parmod Kumar @ Tori, Vinod Kumar @ Pinki, the accused/appellant Sunil Kumar @ Kala, Sham Singh and Sonu.

On the basis of the statement made by the complainant Mohan Lal PW5, First Information Report bearing No.115 was registered at Police Station, Naraingarh, at 4.15 AM on 8.9.1995. A special report in respect thereof was signed by the Ilaqa Magistrate at 7.00 AM on 9.9.1995. It would be pertinent to mention, that the aforesaid special report was sent to the Ilaqa Magistrate through "dak" on account of the fact, that the First Information Report, as it was originally recorded, was in respect of offences under Sections 323, 506, 148 and 149 of the Indian Penal Code.

On 8.9.1995, ASI Puran Chand PW7 received a ruqa Ex.PH,

through a ward-servant at the Primary Health Centre, Shahazadpur, in respect of the arrival of the complainant Mohan Lal PW5 at the Primary Health Centre, Shahazadpur, in an injured condition. On reaching, the Primary Health Centre, Shahazadpur, ASI Puran Chand PW7 moved an application Ex.PJ before the attending doctor to determine whether Mohan Lal PW5 was fit to make a statement. Accordingly, ASI Puran Chand PW7 recorded the statement of Mohan Lal PW5, Ex.PC, leading to the registration of the First Information Report, referred to in the foregoing paragraph. From the Primary Health Centre, Shahazadpur, Parmil Kumar was referred to the Civil Hospital, Naraingarh. ASI Puran Chand PW7 after collecting a copy of the medico-legal examination of the complainant Mohan Lal PW5, inspected the spot and recorded the statements of three witnesses present there. ASI Puran Chand PW7 then received a telephonic message from Police Station, Naraingarh to the effect that the injured Parmil Kumar had been referred to the PGI, Chandigarh, by the attending doctors at the Civil Hospital, Naraingarh. Thereafter, a further message Ex.PL was received in the Police Station, Naraingarh to the effect, that Parmil Kumar had died. ASI Puran Chand PW7 then proceeded towards the PGI, Chandigarh from where he collected ruqa Ex.PL/1, which was sent by the authorities of the PGI, Chandigarh, to the Police Post located in the PGI, Chandigarh, alongwith the death summary Ex. PL/2. From the Police Post, PGI, Chandigarh, ASI Puran Chand PW7 proceeded to the dead house of the PGI, Chandigarh, where the dead body of Parmil Kumar was identified by Ramesh Kumar and Dharam Pal. ASI Puran Chand PW7 prepared the inquest report Ex.P1, whereafter, he moved an application Ex.PN to the Head of the Department of Anatomy and Forensic Medicine, PGI,

Chandigarh, for conducting the postmortem examination of the dead body of Parmil Kumar. Vide endorsement Ex.PN/1, the dead body of Parmil Kumar was sent to the General Hospital, Sector 16, Chandigarh, for postmortem examination. The authorities at the General Hospital, however, refused to conduct the postmortem examination. Whereupon, on 9.9.1995, ASI Puran Chand PW7 brought back the dead body of Parmil Kumar to the PGI, Chandigarh for postmortem examination. When ASI Puran Chand PW7 took the dead body of Parmil Kumar to the PGI, Chandigarh, he was directed to get the postmortem examination conducted at the Civil Hospital, Naraingarh. Accordingly, ASI Puran Chand PW7 brought the dead body of Parmil Kumar to the Civil Hospital, Naraingarh. On the same day i.e. on 9.9.1995, the postmortem examination on the dead body of Parmil Kumar was conducted at the Civil Hospital, Naraingarh. On 12.9.1995, ASI Puran Chand PW7 succeeded in arresting the accused/appellant Sunil Kumar @ Kala. During the course of his interrogation, the accused/appellant Sunil Kumar @ Kala made a disclosure statement that he had kept concealed a "lathi" in his house, which he could get recovered. His disclosure statement was recorded as PQ. The accused/appellant Sunil Kumar @ Kala then led the police party to the disclosed place and got recovered a "lathi". The "lathi" was put into a sealed parcel, and thereafter, it was taken into possession vide recovery memo Ex.PQ/2. On the same day i.e. on 12.9.1995, ASI Puran Chand PW7 arrested the accused Parmod Kumar @ Tori and Pawan Kumar. During the interrogation of the accused Pawan Kumar, he made a disclosure statement that he had kept concealed a hockey in his cattle house, and that, he could get the same recovered. His disclosure statement was recorded as Ex.PR. The accused Pawan Kumar

then led the police party to the disclosed place and got recovered a hockey stick, which was taken into possession vide recovery memo Ex.PR/2. Likewise, the disclosure statement of the accused Parmod Kumar @ Tori was recorded as Ex.PS and the recovery of a "lathi" in furtherance thereof, was recorded vide recovery memo Ex.PS/2. ASI Puran Chand PW7 also arrested the accused/appellant Vinod Kumar @ Pinki on 12.9.1995. The accused Vinod Kumar @ Pinki produced a "lathi", which was taken into possession vide recovery memo Ex.PT/1. The remaining two accused, namely, Sham Singh and Sonu were also arrested on 12.9.1995. The case property referred to hereinabove, was deposited by ASI Puran Chand PW7 with the Moharrir Head Constable at the Police Station. ASI Puran Chand PW7 then moved an application Ex.PU to the Medical Officer, Civil Hospital, Naraingarh, to determine whether the injuries on the person of the deceased Parmil Kumar could have been inflicted with the "lathi" recovered from the accused/appellant Sunil Kumar @ Kala. On his aforesaid application, the doctor opined that the injury on the person of the deceased Parmil Kumar could have been caused with the "lathi" under reference. After completing the investigation and other essential police formalities, a challan was presented in the Court of the Judicial Magistrate Ist Class, Ambala City, on 28.11.1995.

The Judicial Magistrate Ist Class, Ambala City, by his order dated 20.12.1995, on the basis of the facts emerging out of the evidence gathered by the investigating agency, arrived at the prima-facie conclusion, that the accused Sunil Kumar @ Kala, Harish Kumar, Pawan Kumar, Parmod Kumar, Vinod Kumar and Sham Singh had committed the offences under Sections 148, 149, 323, 324, and 302 of the Indian Penal Code.

Since the offence under Section 302 of the Indian Penal Code is exclusively triable by the Court of Session, the Judicial Magistrate Ist Class, Ambala City, by his order dated 20.12.1995, committed the case for trial to the Court of Session.

The Additional Sessions Judge, Ambala, by his order dated 27.2.1996 charged all the accused Sunil Kumar @ Kala, Pawan Kumar, Parmod Kumar @ Tori, Vinod Kumar @ Pinki, Sham Singh and Harish Kumar @ Sonu, for having constituted an unlawful assembly with deadly weapons and in furtherance of a common object had caused the murder of Parmil Kumar, and injuries on the person of the complainant Mohan Lal PW5, under Section 148 of the Indian Penal Code. Secondly, all the accused were charged under Section 323 read with Section 149 of the Indian Penal Code, on account of having collected together in an unlawful assembly, and having entertained a common object of voluntarily causing hurt to the complainant Mohan Lal PW5. All the accused were also charged under Section 302 read with Section 149 of the Indian Penal Code, for having intentionally committed the murder of Parmil Kumar, in furtherance of their common intention. Fourthly, all the accused were charged under Section 506 read with Section 149 of the Indian Penal Code, for having, in furtherance of their common object as members of an unlawful assembly, criminally intimidated the complainant Mohan Lal PW5 and the deceased Parmil Kumar by threatening to kill them.

The accused were then confronted with the charges levelled against them. All the accused pleaded not guilty, and claimed trial.

During the course of the trial, the prosecution examined a number of witnesses. A brief description of the statements of the witnesses

produced by the prosecution is being summarised hereunder. The prosecution first of all, examined Dr. Ramesh Kumar, Medical Officer, General Hospital, Naraingarh, as PW1. Dr. Ramesh Kumar PW1 stated that he had conducted the medico-legal examination of Parmil Kumar on 8.9.1995 at 4.10 AM and found the following injuries on his person:-

> "1. There was present a depression of the size of 6 cm x 3 cm over the left parietal region of scalp just medial to the parietal eminence. Advised x-ray skull A.P .lateral.
>
> 2. Incised wound of the size of 2 cm x ¼ cm x skin deep present on the extension surface of lower-part of right fore-arm. Fresh bleeding was present."

Dr. Ramesh Kumar PW1 also stated that when he had examined Parmil Kumar, he was delirious, and was not speaking. He also stated that injury No.1 was kept under observation, while injury No.2 was simple in nature. It would be interesting to note that Dr. Ramesh Kumar PW1 during the course of his testimony asserted, that he had not removed the clothes of Parmil Kumar when he had conducted his medico-legal examination. The statement of Phool Kumar was recorded as PW2. He stated that he had prepared the report under Section 173 of the Code of Criminal Procedure on 6.11.1995, after investigation of the case had been completed. The statement of Parshotam Lal was recorded as PW3. During the course of his testimony, he asserted that he had recorded the First Information Report. He also stated that he had sent the ruqa to the investigating officer after making his endorsement thereon. Constable Manohar Lal was produced as PW4. He stated that he had visited the place of occurrence i.e. village Shahazadpur on 7.11.1995, and that, at the instance of the complainant Mohan Lal PW5, he

had prepared the scaled site plan Ex.PP. The statement of Mohan Lal was recorded as PW5. While appearing before the trial Court, the complainant Mohan Lal PW5 reiterated the factual position as had been narrated by him when he had made the complaint to ASI Puran Chand PW7, on 8.9.1995. The statement of Dharam Pal was recorded as PW6. It would be pertinent to mention, that Dharam Pal PW6 was the father of the deceased Parmil Kumar. While appearing before the trial Court, he stated that on the night intervening 7/8.9.1995, he was sleeping on the roof of his house. At 1.00 AM, he heard some noises and peeped blow. He then came down and reached the flour mill of Gian Chand, blacksmith and saw the altercation between his son i.e. the deceased Parmil Kumar and his brother i.e. the complainant Mohan Lal PW5 with the accused present in Court. Dharam Pal PW6 asserted that the accused Pawan Kumar was armed with a hockey stick, whereas, the accused/appellant Sunil Kumar @ Kala and the accused Parmod Kumar @ Tori were armed with “lathis”. He further stated that Sham Singh and Sonu were empty handed. He corroborated the testimony of the complainant Mohan Lal PW5 in respect of the injuries caused by the accused party to his son Parmil Kumar and his brother Mohan Lal PW5, as well as, seats thereof. The statement of ASI Puran Chand was recorded as PW7. It would be pertinent to mention, that ASI Puran Chand PW7 was assigned the responsibility of the investigation of the case. While appearing before the trial Court, he narrated the details of the investigation carried out by him. Relevant particulars in respect of the investigation of the case have already been recorded above. The prosecution then examined Dr. Anuj Mangla, Medical Officer, Primary Health Centre, Shahazadpur, as PW8. While appearing before the trial Court, Dr. Anuj Mangla PW8 asserted that

he had conducted the medico-legal examination of the complainant Mohan Lal PW5 on 8.9.1995 at 2.30 AM, and found the following injuries on his person:-

> "1. A lacerated wound of 3" x 2 mm x 3 mm, size on the head in the middle. There was blood oozing out and mild swelling was present. There was no loss of consciousness and no dizziness or vomiting. The pupils, pulse and B.P. were normal.
>
> 2. An abrasion of 1 x 1 on the left thumb on dorsial aspect was present. There was pealing of skin and blood oozing out.
>
> 3. An abrasion with redness on the right shoulder on posterior aspect was present. There was no peeling of skin. X-ray skull was advised for injury No.1."

In the opinion of Dr. Anuj Mangla PW8, all the injuries on the person of the complainant Mohan Lal PW5 had been inflicted with a blunt weapon, the probable duration whereof was between one/two hours. Dr. Anuj Mangla PW8 also opined that injury No.1 could have been inflicted with a blow from a hockey stick, and that, injury Nos.2 and 3 could have been caused with a "lathi". At 3.15 AM on 8.9.1995, Dr. Anuj Mangla PW8 also conducted the medico-legal examination of the accused Vinod Kumar @ Pinki and found the following injuries on his person:-

> "1. A lacerated wound of 1-1/2″ x 2 mm x 2 mm size on the head in the middle. There was blood oozing out and mild swelling. There was no loss of consciousness and no vomiting. Pulse and BP was normal.
>
> 2. An abrasion of 1 x 1 cm on the left index finger on lateral aspect. There was no blood oozing out and no swelling."

In the opinion of Dr. Anuj Mangla PW8, both the injuries on the person of the accused Vinod Kumar @ Pinki were simple in nature, and had been inflicted with a blunt weapon. On the same day i.e. on 8.9.1995, at 3.30 AM, Dr. Anuj Mangla PW8 had conducted the medico-legal examination of the accused Pawan Kumar and found the following injuries on his person:-

> "1. A lacerated wound of 1-1/2 x 2 mm size on the left side of head. There was mild swelling and blood oozing out. There was no loss of consciousness or vomiting. Pulse and BP were normal.
>
> 2. A swelling of 1 x 1 inch size on the left should on posterior aspect at the acromion. There was pain on palpation.
>
> 3. A swelling of 2x3 inch size on the right fore-arm on post aspect 2 inch below the elbow joint. There was pain on palpation and movement.
>
> 4. The swelling on the ring and middle finger of right hand and pain on movement. "

The statement of Dr. Ashwani Kashyap, Medical Officer, Junior Resident, Department of Anaesthesia, Postgraduate Institute of Medical Sciences, Rohtak, was recorded as PW9. He stated that on 9.9.1995, he was posted as Medical Officer at the Civil Hospital, Naraingarh, and that, he had conducted the postmortem examination on the dead body of Parmil Kumar on the said date. According to the postmortem report furnished by Dr. Ashwani Kashyap PW9, Parmil Kumar had the following injuries on his person:-

> "1. An abrasion was present on right arm of size 3 x 1 cm.
>
> 2. An incised wound 1 cm x 0.2 cm x skin deep on right wrist

joint medial aspect.

3. Abrasion 3 x 2 cm on right knee joint.

4. Abrasion on left shoulder, round in shape 4 x 1 cm.

5. Linear abrasion on left scapular region of size 7 x 1 cm.

6. A depressed area felt on left side on scalp 5 x 3 cm."

On dissection of the scalp, haemotoma was present on the left frontal posterior part of the left peritorial part. The left parietal and left temporal bones were fractured and subdural haemotoma was present. He also found that the brain matter was pressed. In the opinion of Dr. Ashwani Kashyap PW9, the cause of death of Parmil Kumar was due to the aforesaid head injury, which was ante-mortem in nature, as also, sufficient to cause death in the ordinary course of nature. After recording the statement Dr. Ashwani Kashyap PW9, the prosecution evidence was closed by order.

The statements of the accused were then recorded under Section 313 of the Code of Criminal Procedure. In the first instance, all the accused were confronted with the incriminating evidence appearing on the record of the case. All the accused denied the correctness of the incriminating evidence available on the record of the case. In his defence, the accused/appellant Sunil Kumar @ Kala stated that a false case had been fastened against him. He also stated that he had heard the statement of his co-accused Vinod Kumar @ Pinki, and that, he desired to adopt the same. In his defence, the accused Vinod Kumar @ Pinki, had inter-alia stated as under:-

"The case is false. The occurrence did not take place in the manner alleged. In face on 7.9.95 at about evening time, I alongwith my family members had gone to attend the Gugamari

fair at Shahzadpur. My family members had returned to their houses, however, I stayed there in the fair. On that night at about 11.30 P.M., there was fight between Parmil Kumar (now deceased) and Sunil Kumar my co-accused in the fare. I, Pawan Kumar, Sonu alias Harish Kumar, my co-accused had separated them. Parmil Kumar being aggrieved there attend that he would take revenge from Sunil Kumar. Thereafter, Parmil Kumar left the fair for his house. Then at about 1.00 A.M. on the same night when I alongwith Pawan Kumar, Parmod Kumar alias Tori and Sunil my co-accused were returning to our houses and had reached near the flour house of Gian Chand, we came across Parmil Kumar (now deceased), his father Dharam Pal, Satish Kumar, Rajo and Mohan Lal PW-1 who were coming from the side of their houses. As soon as they reached near us, Mohal Lal threatened me and exclaimed that I was also present in the fair when Parmil Kumar was given beating by sunil kumar. Mohan Lal, Dharam Pal and Satish Kumar armed with lathies at that time. Mohal Lal gave a lathi blow on my head and Dharam Pal gave a lathi blow on the head of Pawan Kumar and another blow each with lathi on the shoulder and arm of Pawan Kumar. Satish Kumar had also given lathi blow to me on my left arm. Parmil and Raju gave fist and slap blows to us. We also acted in our defence and used Danda on Mohan Lal etc. We were rescued by Sunil Kumar and Parmod Kumar. Thereafter, I went to my house from where my uncle took me to Civil Hospital, Naraingarh where I and Pawan Kumar were

medico-legally examined and were given first aid. My statement was also recorded by the police in the hospital copy of which is Ex.DD. Accused Sham Singh was not present in my occurrence."

The trial Court then afforded an opportunity to the accused to lead evidence in their defence. None of the accused, however, led any evidence in their defence. Defence evidence was, accordingly, closed by order on the basis of their statements.

The Additional Sessions Judge, Ambala, delivered the judgement in Sessions Case No.15 of 1997, on 22.8.1998. The accused/appellant Sunil Kumar @ Kala was convicted under Section 302 of the Indian Penal Code for having intentionally committed the murder of Parmil Kumar. Additionally, the accused/appellant Sunil Kumar @ Kala and his co-accused, namely, Pawan Kumar, Parmod Kumar @ Tori, Vinod Kumar @ Pinki, were convicted under Sections 323 read with Section 34 of the Indian Penal Code for voluntarily having caused hurt to Parmil Kumar and the complainant Mohan Lal PW5. The same four accused were also convicted under Section 506(1) read with Section 34 of the Indian Penal Code for criminal intimidation on account of having threatened the deceased Parmil Kumar and the complainant Mohan Lal PW5. The remaining two co-accused, namely, Sham Singh and Harish Kumar @ Sonu were acquitted. On 25.8.1998, the Additional Sessions Judge, Ambala, heard the accused, who had been convicted, on the question of sentence. Thereafter, on the same day by an order dated 25.8.1998, the Additional Sessions Judge, Ambala, sentenced the accused/appellant Sunil Kumar @ Kala to undergo imprisonment for life and to pay a fine of Rs.1,000/-. In

case of default in payment of fine, he was ordered to undergo further rigorous imprisonment for one year. Additionally, the accused/appellant Sunil Kumar @ Kala, as well as, the other co-accused convicted under Section 323 read with Section 34 of the Indian Penal Code, were sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.500/- each. In case of default in payment of fine, the defaulting convict(s) was/were ordered to undergo further rigorous imprisonment for two months. For the offence under Section 506(1) read with Section 34 of the Indian Penal Code, the accused/appellant Sunil Kumar @ Kala, as also, his co-accused, were sentenced to undergo imprisonment for six months and to pay a fine of Rs.500/- each. In case of default in payment of fine, the defaulting convict(s) was/were ordered to undergo further rigorous imprisonment for two months. The trial Court also directed that all the substantive sentences awarded to the accused would run concurrently.

A perusal of the evidence produced on behalf of the prosecution, as well as, the judgement rendered by the Additional Sessions Judge, Ambala, reveal that while convicting the accused/appellant Sunil Kumar @ Kala, reliance was placed on ocular, as well as, expert evidence. In so far as ocular evidence is concerned, reliance was placed on the statements of two eye witnesses, namely, the complainant Mohan Lal PW5 and Dharam Pal PW6. In so far as expert medical evidence is concerned, reliance was placed on the statements of Dr. Ramesh Kumar PW1, Dr. Anuj Mangla PW8 and Dr. Ashwani Kashyap PW9. In order to arrive at the conclusion that the defence version put-forth by the accused was not correct, reliance was placed on the statement of Dr. Anuj Mangla PW8. The trial Court also took into consideration the disclosure statement made by the

accused/appellant Sunil Kumar @ Kala, Ex.PQ, on the basis whereof, the accused/appellant Sunil Kumar @ Kala led the police party to the place disclosed, from where a "lathi" was recovered and taken into possession vide recovery memo Ex.PQ/1.

In order to assail the findings recorded by the trial Court and in order to establish that the evidence produced by the prosecution is not credit-worthy, learned counsel for the accused/appellant Sunil Kumar @ Kala has raised a number of pleas. Learned counsel for the accused/appellant Sunil Kumar @ Kala has vehemently contended that there is no credible evidence on the record of the case to establish the guilt of the accused/appellant Sunil Kumar @ Kala in respect of the charges levelled against him. Each of the pleas raised on behalf of the accused/appellant Sunil Kumar @ Kala is being dealt with in the succeeding paragraphs.

The first contention advanced by the learned counsel for the accused/appellant Sunil Kumar @ Kala, was to the effect that the trial Court had erroneously arrived at the conclusion, that the accused/appellant Sunil Kumar @ Kala was involved in the occurrence under reference. In this behalf it is the vehement contention of learned counsel for the accused/appellant that the accused/appellant Sunil Kumar @ Kala was not even shown to have been a participant of the first altercation between the rival parties, which had taken place on the same day at the "mela" of the "basera at Guga Mari" at Shahazadpur. It is, therefore, the contention of the learned counsel for the accused/appellant Sunil Kumar @ Kala, that there was no occasion, whatsoever, for the accused/appellant Sunil Kumar @ Kala to have participated in the second altercation which took place on the

road in front of the flour mill of Gian Chand, blacksmith.

We have considered the first contention advanced by the learned counsel for the accused/appellant, but find no merit therein. In his defence, while recording his statement under Section 313 of the Code of Criminal Procedure, the accused/appellant Sunil Kumar @ Kala had adopted the statement of the accused Vinod Kumar @ Pinki, relevant extract of the statement of the accused Vinod Kumar @ Pinki has been reproduced above. A perusal of the aforesaid statement reveals that he expressly acknowledged the participation of the accused/appellant Sunil Kumar @ Kala in the occurrence, which had taken place at the "mela" of the "basera at Guga Mari" at Shahazadpur. In view of the above, we find no merit in the first contention of the learned counsel for the accused/appellant.

The second contention advanced by the learned counsel for the accused/appellant was that the prosecution had not narrated the facts constituting the occurrence as it had actually taken place. In this behalf it was pointed out that when the medico-legal examination of the deceased Parmil Kumar was conducted by Dr. Ramesh Kumar PW1 on 8.9.1995, he had found two injuries on his person, whereas, in the postmortem examination conducted by Dr. Ashwani Kashyap PW9, he had found six injuries on the person of the deceased Parmil Kumar. It is, therefore, the vehement contention of the learned counsel for the accused/appellant Sunil Kumar @ Kala that four injuries on the person of the deceased Parmil Kumar had occurred after the occurrence, and that, the liability of the aforesaid additional injuries could not be fastened on the accused/appellant Sunil Kumar @ Kala. It is, therefore, the vehement contention of the learned counsel for the accused/appellant Sunil Kumar @ Kala that the

prosecution version of the occurrence is not the correct version of the manner in which the death of Parmil Kumar had actually taken place.

The second contention advanced by the learned counsel for the accused/appellant Sunil Kumar @ Kala seems to be attractive on first blush. It is, however, pertinent to mention, that in so far as the medico-legal examination conducted by Dr. Ramesh Kumar PW1 on Parmil Kumar, on 8.9.1995 is concerned, it was expressly stated by him that he had not removed the clothes of the injured at the time of conducting the medico-legal examination. The two injuries depicted on the person of the deceased Parmil Kumar highlighted in the medico-legal examination conducted by Dr. Ramesh Kumar PW1, have been extracted above. Likewise, the six injuries on the person of the deceased Parmil Kumar depicted in the postmortem examination conducted on his person, have also been extracted above. The injuries depicted in the medico-legal examination, tally with the injuries at Sr. No.2 and 6 in the postmortem examination. If these two injuries are excluded from the injuries emerging out of the postmortem examination, the remaining injuries are, firstly, an abrasion on the right arm, secondly, an abrasion on the right knee joint, thirdly, an abrasion on the left shoulder and lastly, an abrasion on the left scapular region. All these injuries depicted in the postmortem examination, in addition to the injuries referred to in the medico-legal examination conducted by Dr. Ramesh Kumar PW1, were in the nature of abrasions and could have easily been over-looked for two reasons, firstly, they were insignificant injuries, and secondly, because the clothes of the deceased Parmil Kumar were not taken off when the medico-legal examination was conducted on his person by Dr. Ramesh Kumar PW1 on 8.9.1995 (as has been noticed in his statement

before the trial Court). It is, therefore, not possible for us to accept that four of the injuries on the person of the deceased Parmil Kumar had come to be inflicted after the occurrence had taken place, as has been suggested in the second contention advanced by the learned counsel for the accused/appellant Sunil Kumar @ Kala. In view of the above, we find no merit in the second contention of the learned counsel for the accused/appellant.

The third contention advanced by the learned counsel for the accused/appellant is, that there were three independent witnesses, namely, Dharam Pal, Satish and Shiv who had also witnessed the occurrence. In this behalf learned counsel for the accused/appellant Sunil Kumar @ Kala invited the Court's attention to the statement made by the complainant Mohan Lal PW5 to ASI Puran Chand PW7 on 8.9.1995. It is the vehement contention of the learned counsel for the accused/appellant Sunil Kumar @ Kala, that it was wholly improper for the prosecution to keep back three independent witnesses, and to produce two close relations of the deceased Parmil Kumar, namely, his uncle i.e. the complainant Mohan Lal PW5 and his father Dharam Pal PW6, in order to prove the occurrence.

In order to ascertain the authenticity of the submission advanced by the learned counsel for the accused/appellant Sunil Kumar @ Kala, we have minutely examined the statement of the complainant Mohan Lal PW5, which he had made before ASI Puran Chand PW7 on 8.9.1995. From the statement of the complainant Mohan Lal PW5, the position is not clear whether the three independent witnesses, referred to above, namely, Dharam Pal, Satish and Raju had reached the place of occurrence, whilst the accused party was inflicting blows on the complainant party, or soon

thereafter, after hearing the alarm "bachao-bachao" (help-help) raised by Parmil Kumar and the complainant Mohan Lal PW5. Learned counsel for the respondent-State has vehemently contended that the aforesaid three witnesses, namely, Dharam Pal, Satish and Raju had reached the place of occurrence only on hearing the alarm, and as such, it was not appropriate to produce the said three persons as witnesses, when two eye witnesses of the occurrence were available. The third submission advanced at the hands of the learned counsel for the accused/appellant Sunil Kumar @ Kala is in the nature of a sword, which cuts on both sides. Now that the occurrence on the road in front of the flour mill of Gian Chand, blacksmith, has been admitted by the accused party, the accused party had as much a right as the prosecution, to produce these three witnesses so as to demolish the version of the prosecution story. Having taken the option not to produce the aforesaid three witnesses expressly noticed in the complaint made by the complainant Mohan Lal PW5, as defence witnesses, it is not open to the accused/appellant Sunil Kumar @ Kala to raise a grouse on account of non-production of the said three witnesses. The instant conclusion of ours is primarily based on the fact that while dealing with the determination rendered by the trial Court, we are satisfied that the evidence produced, as had been dealt with by the trial Court, was sufficient to record the conviction of the accused/appellant Sunil Kumar @ Kala. We, therefore, find no merit in the third contention of the learned counsel for the accused/appellant.

The fourth contention advanced by the learned counsel for the accused/appellant was to the same effect as the third submission noticed hereinabove. It was the contention of the learned counsel for the

accused/appellant Sunil Kumar @ Kala, that in so far as the disclosure statement of the accused/appellant Sunil Kumar @ Kala in respect of the place where he had kept concealed the stick of "safeda" with which he had hit a blow on the head of the deceased Parmil Kumar is concerned, the same is shown to have been attested by Ramesh Kumar son of Sadhu Ram and Head Constable Swaran Singh of Police Post, Shahazadpur. It is submitted, that neither of the aforesaid two witnesses was produced to authenticate the disclosure statement Ex.PQ. An identical submission was made at the hands of the learned counsel for the accused/appellant Sunil Kumar @ Kala in respect of the recovery memo Ex.PQ/2. It was submitted by the learned counsel for the accused/appellant Sunil Kumar @ Kala, that atleast one of the attesting witnesses, namely, Ramesh Kumar son of Sadhu Ram, was an independent witness, and he ought to have been produced by the prosecution to authenticate the genuineness of the disclosure statement Ex.PQ, as well as, the recovery memo Ex.PQ/2.

During the course of hearing, learned counsel for the respondent-State pointed out that one of the attesting witnesses on the documents pointed out by the learned counsel for the accused/appellant Sunil Kumar @ Kala, was a police personnel. It is the contention of the learned counsel for the respondent that the disclosure statement, as well as, the recovery memo referred to above, were got recorded by ASI Puran Chand PW7, who had already deposed before the trial Court in respect of the disclosure statement, as well as, the recovery memo, whereas, the other independent witness pointed out by the learned counsel for the accused/appellant Sunil Kumar @ Kala, namely, Ramesh Kumar son of Sadhu Ram, was a relation of the complainant party. It is, therefore,

submitted that no fruitful purpose would be served by producing Ramesh Kumar, referred to by the learned counsel for the accused/appellant Sunil Kumar @ Kala. On being confronted, learned counsel for the accused/appellant Sunil Kumar @ Kala, did not dispute the fact that Ramesh Kumar was a relation of the complainant party, In view of the above, we are satisfied that non-production of either Ramesh Kumar or Head Constable Swaran Singh, did not, in any way, affect credibility of the disclosure statement Ex.PQ and the recovery memo Ex.PQ/2, as ASI Puran Chand PW7 had made a statement in connection with the same before the trial Court. In view of the above, we find no merit in the fourth contention of the learned counsel for the accused/appellant.

The last contention advanced by the learned counsel for the accused/appellant was to the effect that the offence under Section 302 of the Indian Penal Code was not made out against the accused/appellant Sunil Kumar @ Kala. Learned counsel for the accused/appellant Sunil Kumar @ Kala vehemently contends that, if at all a case is made out, the same is made out under Section 304, Part II of the Indian Penal Code. In order to authenticate the aforesaid, learned counsel for the accused/appellant Sunil Kumar @ Kala has placed reliance on the judgement rendered by the Supreme Court in State of Rajasthan Vs. Madho, 1991 RCR (Criminal) 463.

We have perused the judgement relied upon by the learned counsel for the accused/appellant Sunil Kumar @ Kala. In Madho's case (supra), the accused had been acquitted by the Supreme Court on account of the fact, that “the evidence tendered against the convict accused was full of infirmities, and the prosecution version regarding the incident could not be

accepted as the prosecution witnesses had failed to explain the injuries sustained by these two accused persons." In so far as the present case is concerned, there is no infirmity, whatsoever. The prosecution version of the incident has been substantiated on the basis of two eye witness accounts i.e. through the statements of the complainant Mohan Lal PW5 and Dharam Pal PW6. There is no conflict in the testimony of the aforesaid two witnesses. In view of the above, we are of the view that the judgement relied upon by the learned counsel for the accused/appellant Sunil Kumar @ Kala is clearly inapplicable to the facts and circumstances of this case.

Reliance was also placed on the decision rendered by the Apex Court in Kailash Vs. State of M.P., 2007(1) RCR (Criminal) 229, wherein, the Apex Court arrived at the conclusion, that the offence made out was under Section 304 Part II of the Indian Penal Code and not under Section 302 of the Indian Penal Code. The facts and circumstances of the instant case are totally incomparable to the controversy decided in Kailash's case (supra). In so far as the present case is concerned, the postmortem examination conducted on Parmil Kumar revealed as many as six injuries on his person and the medico-legal examination conducted on the complainant Mohan Lal PW5 at the hands of Dr. Anuj Mangla PW8 revealed as many as three injuries on his person. It is, therefore, not possible for us to accept, that the instant occurrence can be treated as an offence under Section 304 Part II of the Indian Penal Code.

No other submission besides those noticed in the foregoing paragraphs, was advanced at the hands of the learned counsel for the accused/appellant Sunil Kumar @ Kala.

For the reasons recorded hereinabove, we find no merit in the

instant appeal, and the same is, accordingly, dismissed.

The bail bonds/surety bonds of the appellant is cancelled. The Chief Judicial Magistrate is directed to take necessary steps for getting the appellant arrested so that he may undergo the remaining part of the sentence awarded to him by the trial Court and confirmed by this Court.

(J.S. Khehar)
Judge.

(Jora Singh)
Judge.

30.05.2008
sk.